

IN THE UNITED STATES BANKRUPTCY COURT

FOR THE

SOUTHERN DISTRICT OF GEORGIA

Augusta Division

IN RE:	)	Chapter 13 Case
	)	Number <u>96-11193</u>
JOSEPH T. SMITH, JR.	)	
JANINE A. SMITH	)	
	)	
Debtors	)	
_____	)	
BARNEE C. BAXTER,	)	FILED
CHAPTER 13 TRUSTEE	)	at 11 O'clock & 45 min. A.M.
	)	Date: 3-21-97
Movant	)	
	)	
vs.	)	
	)	
JOSEPH T. SMITH, JR.	)	
JANINE A. SMITH	)	
	)	
Respondents	)	
	)	

**ORDER**

Barnee C. Baxter, Chapter 13 Trustee in this case (hereinafter "Trustee") objects to the confirmation of Joseph and Janine Smith's (hereinafter collectively "Debtors") proposed Chapter 13 plan because under the plan the Debtors fail to submit all of their disposable income to plan payments for a period of at least 36 months, reserving \$182.00 per month for Mr. Smith's voluntary savings plan established under 26 U.S.C. 401(k) (hereinafter "401(k)"). This court has jurisdiction of this matter pursuant to

28 U.S.C. §157(b) (1) & 2(A), (L) & (O). The objection is sustained.

The Debtors' Schedule I discloses monthly income of \$4,134.00, less payroll taxes of \$1,139.67, insurance of \$474.50, and a 401(k) contribution of \$182.00, for net income of \$2,337.83. The Debtors' Chapter 13 plan provides for payments of \$315.00 a month for thirty-six months, paying less than a 100% dividend to unsecured creditors. The Trustee objected to the 401(k) contribution.<sup>1</sup> According to the Trustee's analysis, reducing the 401(k) contribution of \$182.00 and increasing the debtors' plan payments by \$242.00, \$100.00 to account for the excess payroll tax withholding (see supra note 1) and \$142.00 from the current \$182.00 401(k) contribution, would fully repay all creditors over the thirty-six month period of the plan.

The Debtors maintain that the 401(k) deduction is a reasonable and necessary expense under 11 U.S.C. §1325(b)(2)<sup>2</sup>, that the

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<sup>1</sup>The trustee also objected to an excessive payroll tax withholding contending that this level of withholding would result in a substantial annual tax refund which should be taken into consideration in establishing the Debtors' disposable income for plan payment purposes. At hearing the Debtors conceded that in the previous tax year they received a \$1,200.00 federal income tax refund and a \$200.00 state tax refund. The Debtors and the Trustee compromised this objection by the Debtors agreeing to increase their plan payment by \$100.00.

<sup>2</sup>11 U.S.C. §1325(b) provides:

(1) If the trustee or the holder of an allowed unsecured claim objects to the confirmation of the plan, then the court may not approve the plan unless, as of the effective date of the plan—

(A) the value of the property to be distributed under the plan on account of such claim is not less than the amount of such claim; or

(B) the plan provides that all of the debtor's projected disposable income to be received in the three-year period beginning on the date that the first payment is due under the plan will be applied

Trustee's objection to the deduction is arbitrary and capricious, that the objection violates the equal protection clauses of the United States and State of Georgia Constitutions and that a determination by this court that the 401(k) plan contribution is not reasonable and necessary violates the constitutional separation of powers doctrine. The Debtors, as plan proponents, bear the ultimate burden proof on all confirmation criteria. General Motors Acceptance Corp. v. Johnson (In re Johnson), 145 B.R. 108, 111 (Bankr. S.D. Ga. 1992), rev'd on other grounds, 165 B.R. 524 (S.D. Ga. 1994); Fleet Finance, Inc. v. Bostic (In re Bostic) Ch. 13 Case No. 95-10205 slip op. at 10-11 (Bankr. S.D. Ga. August 31, 1995 ). Where the Chapter 13 Trustee or any holder of an allowed unsecured claim objects to the confirmation of the plan, the plan proponent, the debtor, must establish by a preponderance of the evidence that the debtor is devoting all projected disposable income, as defined by 11 U.S.C. §1325(b)(2), for a period of at least three years to plan payments. See supra note 2.

I. The Debtors failed to prove that the 401(k) payments are

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to make payments under the plan.

(2) For purposes of this subsection, "disposable income" means income which is received by the debtor and which is not reasonably necessary to be expended—

(A) for the maintenance or support of the debtor or a dependent of the debtor; and

(B) if the debtor is engaged in business, for the payment of expenditures necessary for the continuation, preservation, and operation of such business.

reasonable and necessary for their maintenance and support.

Section 1325(b)(2) excepts from a debtor's disposable income amounts which are reasonably necessary for the maintenance and support of the debtor or a dependant of the debtor. Although, as the Debtors argue, saving a portion of Mr. Smith's salary for retirement may be a reasonable and prudent course of action, such an expense is not necessary for the maintenance or support of the Debtors during the pendency of the Chapter 13 case. See, In re Delnero, 191 B.R. 539 (Bankr. N.D. N.Y. 1996); accord, Harshbarger v. Pees (In re Harshbarger), 66 F.3d 775 (6th Cir. 1995) (Chapter 13 plan permitting Debtors to pay 100% of an unsecured loan to their ERISA-qualified profit sharing account did not satisfy disposable income test); Cf., In re Smith, 196 B.R. 565 (Bankr. M.D. Fla. 1996) (Debtor's plan confirmed despite continued voluntary savings contributions because plan also proposed 100% dividend to unsecured creditors.) Preserving Mr. Smith's 401(k) contributions directly reduces the unsecured creditors' dividends, effectively requiring the unsecured creditors to fund the Debtors' retirement program during the pendency of the Chapter 13 plan. Contrary to the Debtors' arguments, sustaining the objection does not deny the Debtors the opportunity to save for future retirement. Sustaining the objection merely reduces the Debtors savings for retirement from \$182.00 per month to \$40.00 per month for the thirty-six month term

of the plan<sup>3</sup>.

II. The Trustee's objection to the 401(k) contribution is not arbitrary and capricious.

The Debtors assert that, given the opportunity, they can present evidence that the Trustee routinely fails to object to employer-mandated retirement contributions while objecting to voluntary payments to 401(k) plans. The Debtors assert that this inconsistent treatment is arbitrary and capricious, thereby requiring me to overrule the objection. The Debtors had adequate notice of the Trustee's objection and offered no evidence or authority at hearing to support their assertion that the retirement programs described by the Debtors as mandatory retirement contributions are actually indistinguishable from the Debtors' 401(k) savings, notwithstanding the Debtors' own contentions that establish the facial dissimilarity of the plans (ie. voluntary vs. involuntary). The Debtor failed to introduce evidence that the Debtor's 401(k) savings contribution is indistinguishable from some other retirement program. To the contrary, the evidence presented establishes that the Debtor's voluntary 401(k) savings for purposes of Chapter 13 disposable

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<sup>3</sup>Although not a deciding factor in this case, I note that although Mr. Smith has been working for his employer for four years, he only began contributing to the 401(k) plan shortly before filing the instant petition. The Debtors' schedules reflect a 401(k) retirement account balance of \$835.00. With a funding rate of \$182.00 a month, Mr. Smith has been contributing to the plan only 4 ½ months prior to filing the Chapter 13 petition ( $\$835.00 \div 182 = 4.59$ ).

income analysis is indistinguishable from any debtor's desire to establish a regular savings account consisting of after tax income for retirement or any other purpose. Furthermore, each Chapter 13 plan must be and is analyzed independently to determine whether a debtor is applying all disposable income to plan payments. Bankruptcy Code §1302(b)(2) requires the Trustee to appear and be heard at any hearing concerning confirmation of the plan and §1325 establishes the criteria for the court to consider in confirming a debtor's proposed Chapter 13 plan. I find no evidence that the Chapter 13 Trustee has acted in an arbitrary and capricious manner.

The Debtors obfuscate the issue: whether a debtor may divert a portion of their income during the pendency of a Chapter 13 plan to savings at the expense of the unsecured creditors? They may not.

III. The Chapter 13 Trustee's objection to a 401(k) plan contribution does not violate the equal protection clause of the Fourteenth Amendment to the United States Constitution and to Article I Section 1 Paragraph 2 of the Georgia Constitution.

The Debtors argue that the Trustee's disparate treatment, as characterized by the Debtors, between voluntary and involuntary retirement contributions violates the equal protection clauses of

the United States<sup>4</sup> and Georgia Constitutions<sup>5</sup>. Aside from their failure to introduce any evidence to support any disparate treatment, the Fourteenth Amendment to the United States Constitution insures equal protection against disparate treatment only from State actions and is inapplicable to the Trustee. District of Columbia v. Carter, 409 U.S. 418, 423-425, 93 S.Ct. 602, 606, 34 L.Ed.2d 613 (1977) reh'g denied 410 U.S. 959, 93 S.Ct. 1411, 35 L.Ed.2d 694 (Fourteenth Amendment has reference to state action exclusively and not to any action of private individuals.) Similarly, the Georgia equal protection clause, although worded differently than the Fourteenth Amendment, has been interpreted as equivalent to the Fourteenth Amendment, and requires State action to establish a claim of denial of equal protection. McDaniel v. Thomas, 248 Ga. 632, 638, 285 S.E.2d 156, 161 (1981) (Although employing different phraseology, the Georgia equal protection clause is "substantially equivalent" to the equal protection of the Fourteenth Amendment); Coffey Enter. Realty & Dev. Co. Inc. v. Holmes, 233 Ga. 937, 213 S.E.2d 882 (1975) (Without meaningful state governmental action, the plaintiff has no claim under Georgia equal

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<sup>4</sup>U.S. Const. Amend 14, Sec. I provides in part:  
... No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

<sup>5</sup>Georgia Const. Art. 1, §1, ¶2 provides:  
Protection to person and property is the paramount duty of government and shall be impartial and complete. No person shall be denied the equal protection of the laws.

protection clause.) The Debtors have failed to introduce any evidence of State action.

IV. A determination by this court that the Debtors' voluntary savings pursuant to a 401(k) plan fails to meet the confirmation criteria of 11 U.S.C. §1325 is not a violation of the constitutional separation of powers.

Finally, the Debtors assert that Congress has determined that retirement contributions are reasonable and necessary, and that the courts are powerless to overturn this finding under the separation of powers doctrine. The Debtors cite no Congressional enactment that an individual's voluntary savings under a 401(k) plan is reasonable and necessary for a debtors' support and maintenance under 11 U.S.C. §1325(b), and I am not aware of any such determination. Congress' allowing individuals under appropriate circumstances to defer federal income tax on earnings saved for future retirement does not mandate a determination by the bankruptcy court that any such savings is exempt from disposable income under §1325(b) (2) (A) .

In conclusion, the Debtors have failed to carry the burden of proof by a preponderance of the evidence that their Chapter 13 plan proposes to devote all disposable income to plan payments for a period of at least three years. They failed to introduce any evidence in support of their charges against the Chapter 13 Trustee that he has acted in an arbitrary and capricious manner or discriminated against these Debtors in any manner. The only evidence presented at hearing establishes that the Debtors' proposed Chapter 13 plan diverts \$182.00 from disposable income for savings



under a 401(k) plan and that as a result of that diversion, unsecured creditors will receive less than full payment over three years. The Debtors failed to establish that this savings is necessary for their maintenance and support during the pendency of the Chapter 13 plan.

The Debtors having failed to prove the confirmation criteria of 11 U.S.C. §1325(b), the Trustee's objection to confirmation is ORDERED sustained and the Debtors are ORDERED to file a modified plan in compliance with the terms hereof within 14 days of the docketing of this order or the case will be dismissed.

JOHN S. DALIS  
CHIEF UNITED STATES BANKRUPTCY JUDGE

Dated at Augusta, Georgia  
this 21st day of March, 1997.